

Nos. 19-72109, 19-72280

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**CENTER FOR FOOD SAFETY, CENTER FOR BIOLOGICAL
DIVERSITY,**

Petitioners,

V.

**ANDREW WHEELER, in his official capacity as Administrator; U.S.
ENVIRONMENTAL PROTECTION AGENCY,**

Respondents,

DOW AGROSCIENCES LLC,

Respondent-Intervenor.

**MOTION FOR LEAVE TO FILE BRIEF OF THE STATES OF
CALIFORNIA, HAWAII, MARYLAND, MINNESOTA, NEW JERSEY,
NEW YORK, NEW MEXICO, OREGON, VERMONT, AND
WASHINGTON, AND THE COMMONWEALTH OF
MASSACHUSETTS AS AMICI IN SUPPORT OF PETITIONERS'
OPPOSITION TO EPA'S MOTION FOR VOLUNTARY REMAND
WITHOUT VACATUR**

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December 7, 2020

MOTION FOR LEAVE TO FILE BRIEF

Amici, the States of California, Hawaii, Maryland, Minnesota, New Jersey, New York, New Mexico, Oregon, Vermont, and Washington, and the Commonwealth of Massachusetts (Amici States), respectfully move for leave to submit the attached amicus curiae brief in support of the opposition of Petitioners Center for Food Safety, Center for Biological Diversity, Pollinator Stewardship Council, American Beekeeping Federation, and Jeffrey S. Anderson (collectively Petitioners) to Respondent EPA's motion for voluntary remand without vacatur. Petitioners consent to the filing of the brief; Respondent EPA and Respondent-Intervenor Dow take no position.¹

Amici States' motion should be granted because Amici States have unique interests in prompt resolution of Petitioners' Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) claims, which EPA's motion would foreclose. FIFRA contemplates a careful balance of federal and state authority, where EPA reviews set the stage for state regulatory processes. When EPA eschews its duties under FIFRA, it passes the regulatory burden to states, which have fewer resources and

¹ States may file amicus briefs "without consent of the parties or leave of court" during initial consideration of a case on the merits pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure and Ninth Circuit Rule 29-2(a). Because it is not clear whether this rule applies in the context of EPA's motion for voluntary remand without vacatur, out of an abundance of caution, Amici States have sought consent from the parties and submit this motion for leave.

regulatory tools at their disposal to study and mitigate any adverse human health or environmental impacts. In this particular case, sulfoxaflor's toxicity poses risks to pollinators, which are critical to Amici States' economies and ecosystems. FIFRA does not leave states to confront these concerns alone.

Amici States' brief also explains the broader implications of granting EPA's motion for future FIFRA challenges to EPA pesticide registration decisions. Because EPA's non-compliance with the Endangered Species Act (ESA) is not unique to this pesticide registration, granting EPA's motion would set a precedent allowing EPA to frustrate FIFRA review of its pesticide registration decisions by admitting its ESA non-compliance and seeking remand without vacatur. In this way, EPA could indefinitely delay resolution of ripe FIFRA claims. Amici States' brief elaborates on EPA's practice of registering pesticides without conducting ESA analysis and the implications for future FIFRA cases if EPA's motion is granted.

CONCLUSION

For the reasons stated above, Amici States request that the Court grant their motion for leave to file the attached brief as amici curiae supporting Petitioners' opposition to EPA's motion for voluntary remand without vacatur.

Dated: December 7, 2020

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this motion complies with the requirements of Federal Rules of Appellate Procedure 27(d) and 32(c) because it uses a proportionately spaced Times New Roman font, has a typeface of 14 points, and contains 426 words.

Dated: December 7, 2020

/s/ Robert D. Swanson

Robert D. Swanson